1037

SUPREME COURT OF THE UNITED STATES.

No. 195.

GEORGE H. KYLE, SAMUEL LEE KYLE, AND SAMUEL A. S. KYLE, PLFFS. IN ER.,

vs.

JOHN MACRAE, DONALD MACRAE, AND JOHN W. K. DIX.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

INDEX.

	Original.	Print.
Summons	1	1
Declaration	2	2
Marshal's return	4	3
Rule plea	4	3
Plea and issue	5	3
Jury	6	4
Verdict	6	4
Judgment	7	4
Defendants' bill of exceptions	7	5
Letter from Fenby & Bro. to J. & D. McRae & Co	8	5
Letter from J. & D. McRae & Co. to Fenby & Bro	8	6
Telegraphic despatch to J. & D. McRae & Co	9	6
Do. from J. & D. McRae & Co. to Fenby & Bro	9	6
Letter from J. & D. McRae & Co. to Fenby & Bro	9	6
Letter from Fenby & Bro. to J. & D. McRae & Co	10	6
Letter from J. & D. McRae & Co. to Fenby & Bro	10	7
Letter from same to same	11	7
Invoice	12	8
Bill of exchange	13	9
Protest	13	9
Letter from Fenby & Bro. to J. & D. McRae & Co	14	10
Letter from J. & D. McRae & Co. to Fenby & Bro	15	10
Bill of lading	15	10
Letter from J. & D. McRae & Co. to Fenby & Bro	16	11
Telegraphic despatch, J. & D. McRae & Co. to James Corner & Sons.	17	11
Bill of exchange	17	11

	Original.	Print.
Protest	17	12
Notice from Brown & Brune to captain of brig Orlando	19	12
Account current	20	13
Memorandum made by Mr. Gill	21	14
Evidence of B. M. Corner	22	14
Evidence of Mr. Richardson	23	14
Cross-examined	23	15
Bill of lading	23	15
Mr. Corner recalled	25	16
Evidence of Mr. Lamb	25	16
Evidence of Samuel Fenby	25	16
Promissory notes of Dinsmore & Kyle	26	17
Promissory notes of S. Fenby & Bro	27	17
Cross-examination	28	18
Account sales	29	18
Evidence of James Carey Coale	30	19
Receipt	30	20
Evidence of Henry A. Thompson	32	20
Cross-examined	32	21
Evidence of D. J. Foley	33	21
Cross-examined	34	22
Evidence of Charles Taylor	34	22
Cross-examined	35	22
Evidence of Mr. Hall	35	22
Cross-examined	35	22
Regulation of the board of trade	37	23
Evidence of George U. Porter	37	24
Evidence of Edw'd B. Dallam	38	24
Plaintiffs' prayers	38	24
Defendants' prayers	41	25
Court's instructions	46	28
Plaintiffs' 1st exception	48	29
Plaintiffs' 2d exception	49	30
Writ of error	50	30
Citation	51	31
Writ of error bond	52	31
Clerk's certificate	54	32

THE UNITED STATES OF AMERICA,
District of Maryland, to wit:

At a circuit court of the United States for the fourth circuit in and for the Maryland district, begun and held at the city of Baltimore on the first Monday in November, in the year of our Lord one thousand eight hundred and fifty-eight—

Present, the honorable R. B. Taney, Chief Justice of the Supreme Court of the United States; William F. Giles, judge of Maryland district; Wm. Meade Addison, esquire, attorney; John W. Watkins, esquire, marshal; Thomas Spicer, clerk:—

Among other were the following proceedings, to wit:

JOHN MCRAE, DONALD MCRAE, and JOHN W. K. DIX,
vs.
GEORGE H. KYLE, SAMUEL LEE KYLE, SAMUEL A. S. KYLE.

Be it remembered that heretofore, to wit, on the twenty-second day of October, in the year of our Lord one thousand eight hundred and fifty-seven, the said John McRae, Donald McRae, and John W. K. Dix, by George M. Gill, George Wm. Brown, and Frederick W. Brune, their attorneys, prosecuted and sued forth out of the circuit court here the writ of the United States of America of summons, directed to the marshal of the Maryland district aforesaid, in the words and of the tenor following, to wit:

Summons.

THE UNITED STATES OF AMERICA,
District of Maryland, to wit:

To the marshal for Maryland district, greeting:

[SEAL.] We command you that you summon George H. Kyle, Samuel Lee Kyle, Samuel A. S. Kyle, and William T. Dalby, if they shall be found in your district, that, all excuses and delays set aside, they be and appear before the circuit court of the United States for the fourth circuit in and for the Maryland district, to be held at the city of Baltimore on the first Monday in November next, to answer unto John McRae, Donald McRae, and John W. K. Dix, citizens of the State of North Carolina, in a plea of trespass upon the case, &c. Hereof you are not to fail at your peril, and have you then and there this writ.

Witness the honorable R. B. Taney, Chief Justice of our Su-

preme Court, the first Monday in December, in the year of our Lord one thousand eight hundred and fifty-six.

G. M. G. Issued 22d October, 1857.

THO. SPICER, *Clk. Circ't Ct.*

And the aforesaid John McRae, Donald McRae, and John W. K. Dix, by their attorneys aforesaid, on the day of prosecuting and suing forth of the aforesaid writ, declared against the said George H. Kyle, Samuel Lee Kyle, Samuel A. S. Kyle, and William T. Dalby in the plea aforesaid, in form following, to wit:

Declaration.

CIRCUIT COURT OF THE UNITED STATES,
For the Fourth Circuit in and for the District of Maryland, Maryland District, to wit:

George H. Kyle, Samuel Lee Kyle, Samuel A. S. Kyle, and William T. Dalby, late of Baltimore city, in Maryland district, were attached to answer unto John McRae, Donald McRae, and John W. K. Dix, citizens of the State of North Carolina, in a plea of trespass on the case, &c.

And the plaintiffs in this action, by George M. Gill, their attorney, complain: For that whereas the said John McRae, Donald McRae, and John W. K. Dix, plaintiffs in this action, on the first day of May, in the year of our Lord eighteen hundred and fifty-seven, to wit, at the district aforesaid, were lawfully possessed as of their own property of certain goods and chattels, to wit, fifty-one bales of cotton, of great value, to wit, of the value of twenty-five hundred dollars current money of Maryland; and being so possessed thereof, they, the said plaintiffs, afterwards, to wit, on the day and year first above mentioned, at the district aforesaid, casually lost the said goods and chattels out of their possession, and the same afterwards, to wit, on the day and year last aforesaid, at the district aforesaid, came to the possession of the said defendants by finding.

Yet the said defendants, well knowing the said goods and chattels to be the property of the said plaintiffs, and of right to belong and appertain to them, but contriving and fraudulently intending, craftily and subtlely, to deceive and defraud the plaintiffs in this behalf, have not as yet delivered the said goods and chattels, or any or either of them, or any part thereof, to the said plaintiffs, although often requested so to do, but have hitherto wholly refused so to do, and afterwards, to wit, on the same day and year last aforesaid, at the district aforesaid, converted and disposed of the said goods and *and* chattels to their own use, to the damage of the said plaintiffs in the sum of five thousand dollars like current money; and therefore they bring their suit, &c.

GEO. M. GILL,
BROWN & BRUNE,
Att'ys for Plff's.

A copy of which said declaration was made and sent with the said writ to the marshal of the Maryland district aforesaid, thereon endorsed, "Case, copy nar., to be left with the defendants." At which mentioned first Monday in November, in the year of our Lord one thousand eight hundred and fifty-seven, being the day of the return of the aforegoing writ, comes into the circuit court here the said John McRae, Donald McRae, and John W. K. Dix, by their attorneys aforesaid; and the marshal of the Maryland district aforesaid, to wit, John W. Watkins, gentleman, to whom the said aforegoing writ was in form aforesaid directed, makes return thereof to the court here, thus endorsed, to wit:

Marshal's Return.

"Summoned Kyles. Languidum Dalby.
J. W. WATKINS, *U. S. Marshal.*

And the said George H. Kyle, Samuel Lee Kyle, and Samuel A. S. Kyle being called, appear in court here by S. T. Wallis and John H. Thomas, esquires, their attorneys.

Rule Plea.

And thereupon, on motion of the said John McRae, Donald McRae, and John W. K. Dix, by their attorneys aforesaid, it is ruled by the court here that the said George H. Kyle, Samuel Lee Kyle, and Samuel A. S. Kyle answer to the declaration aforesaid of the said John McRae, Donald McRae, and John W. K. Dix in the plea aforesaid, or judgment by the court here will be entered against them in default thereof.

And the said George H. Kyle, Samuel Lee Kyle, and Samuel A. S. Kyle, by their attorneys aforesaid, defend the force and injury when, and so forth, and pray leave of the court here to imparl until the first Monday in April next, and then to answer unto the declaration aforesaid of the said John McRae, Donald McRae, and John W. K. Dix in the plea aforesaid, and to them it is granted; the same day is given to the aforesaid John McRae, Donald McRae, and John W. K. Dix also. At which said first Monday in April, in the year of our Lord one thousand eight hundred and fifty-eight, to which said day the said George H. Kyle, Samuel Lee Kyle, and Samuel A. S. Kyle had leave to imparl, and then to answer unto the declaration aforesaid of the said John McRae, Donald McRae, and John W. K. Dix in the plea aforesaid, come again into the circuit court here the parties aforesaid, by their attorneys aforesaid.

Plea and Issue.

And the said George H. Kyle, Samuel Lee Kyle, and Samuel A. S. Kyle, by their attorneys aforesaid, as before, defend the force and injury when, &c., and say that they are not guilty of the prem-

ises above against them imposed, as the said John McRae, Donald McRae, and John W. K. Dix above against them have declared; and of this they put themselves upon the country, &c. And the said John McRae, Donald McRae, and John W. K. Dix, in like manner, &c.

Therefore let a jury thereon appear before the court here on the first Monday in November next, by whom, &c., and who neither, &c., to recognize, &c., because as well, &c. The same day is given to the parties, then and there, &c.

And now here at this term, to wit, the first Monday in November, in the year of our Lord one thousand eight hundred and fifty-eight, come again into the circuit court here the parties aforesaid, by their attorneys aforesaid.

Whereupon, for trying the issue aforesaid, it is ordered by the court here that twenty persons from the panel of petit jurors, returned to the court here by the marshal for the Maryland district aforesaid, be drawn by ballot; and thereupon the twenty persons being so drawn by ballot, and written upon two lists, one of which said lists is delivered to the counsel for the respective parties, and the counsel for each of the said parties having stricken out four persons from the said lists, the remaining twelve persons being called, come, to wit:

Jury.

John B. Leidenstricker, Sheppard C. Leakin, Wm. S. Gittings, L. G. Quinlin, Thomas C. Watkins, Caleb Hoshell, Thomas Bowers, James H. Steele, John Myers, George Coulton, Richard Snowden, and James B. Brewer, who, being empaneled and sworn to say the truth upon the premises, upon their oath do say:

Verdict.

That the said George H. Kyle, Samuel Lee Kyle, and Samuel A. S. Kyle are guilty of the premises, in manner and form as the said John McRae, Donald McRae, and John W. K. Dix have above complained against them, and they assess the damages of them, the said John McRae, Donald McRae, and John W. K. Dix, by occasion of the premises, to the sum of twenty-one hundred and thirty-nine dollars and forty-seven cents current money.

Judgment.

Therefore it is considered by the court here that the said John McRae, Donald McRae, and John W. K. Dix recover against the said George H. Kyle, Samuel Lee Kyle, and Samuel A. S. Kyle the said sum of twenty-one hundred and thirty-nine dollars and forty-seven cents current money, their damages aforesaid by the jury aforesaid in form aforesaid assessed, as also the sum of thirty-

eight dollars and sixty cents, for their costs and charges by them about their suit in this behalf expended, &c., to the said John McRae, Donald McRae, and John W. K. Dix, by the court now here with their assent adjudged; and the said George H. Kyle, Samuel Lee Kyle, and Samuel A. S. Kyle, in mercy, &c.

Memorandum.

Before the jurors aforesaid withdrew from the bar of the court here, the parties aforesaid, by their attorneys aforesaid, tendered to the court here their bill of exceptions, which was by the court here signed and sealed, and which is in form following, to wit:

Defendants' Bill of Exceptions.

IN THE CIRCUIT COURT OF THE UNITED STATES.

JOHN McRAE et al.
vs.
GEORGE H. KYLE et al.

It was admitted in this case that the plaintiffs are copartners, trading under the firm of J. & D. McRae & Company, and are citizens of the State of North Carolina, and that the defendants are copartners, trading under the firm of Dinsmore & Kyle, in Baltimore city, and are citizens of the State of Maryland.

At the trial of this cause, the plaintiffs, to maintain the issue on their part joined, offered in evidence the following correspondence, telegraphic despatches, invoice, bill of lading, bills of exchange, and account current, which were admitted to be genuine.

Letter from S. Fenby & Bro. to J. & D. McRae & Co., dated 18th March, 1857.

(No. 1.) BALTIMORE, *March* 18, 1857.

Messrs. J. & D. McRAE & Co.

GENTLEMEN: We are without any of your recent favors. Cotton has been a dull article for some time, although with our purchases we have done quite well. Should your market go down to 12½ for similar lots shipped to us, buy 150 to 200 bales, avoiding the former grades. The difference is not enough. The fancy cotton has touched bottom, but it is hard to say; the best of we know nothing about it.

Tob. 5⅞ a 600; ca. 60 a 64.

Resp'y, y'rs, &c.,
S. FENBY & BRO.

Letter from J. & D. McRae & Co. to S. Fenby & Bro., 21st March, 1857.

(No. 2.) WILMINGTON, N. C., 21 *March*, 1857.

Messrs. S. FENBY & BRO., *Balto., Md.*

GENT: Your esteemed favor of the 18th at hand, contents noted. Cotton is held firm with us at 12¾ a 13½ c., and most all in market has been sold at that. We think we could get you some next week at about 13 a 13¼, such as we last sent.

Rice, 4½ c.; spts. turpentine, 43 c.; tar, $1 60, in order; pitch, $1 70; c. rosin, $1 15; corn, 80. Respectfully, yours,

(Signed) J. & D. McRAE & CO.

Telegraphic despatch from Balto. to J. & D. McRae & Co., 26th March, 1857.

Buy one hundred cotton, best terms, or two hundred at thirteen cents. S. FENBY & BRO.

Per telegraph.

J. & D. McRae & Co. to S. Fenby & Bro., 26 March, 1857.

(No. 4. WILMINGTON, N. C., *March* 26, 1857.

Messrs. S. FENBY & BRO., *Baltimore.*

Have bought one hundred bales cotton—eighty at thirteen and ¼ cents, twenty at 13½. Can get ninety at thirteen and three-eighths.

(Signed) J. & D. McRAE & CO.

Same to same, 26 March, 1857.

(No. 5.) WILMINGTON, N. C., *March* 26, 1857.

Messrs. S. FENBY & BRO., *Baltimore.*

GENT: Your despatch of to-day was duly received. We purchased about eighty bales a 13¼, and 20 bales at 13½ c., and replied, "Have bo't one hundred bales—80 a 13¼, and 20 a 13½, and can purchase about 90 a 13⅜ c." There are not more than 300 bales cotton now in market, and the receipts are extremely light. We are offered one lot a 13⅜; another lot of 125 bales, 13¼ c.—some very good, and some poor; then there are several small lots offering from 12¾ a 13½ c. No vessel up at this time, but one will be up the first of next week. Respectfully, yours,

(Signed) J. & D. McRAE & CO.

Letter from S. Fenby & Bro. to J. & D. McRae & Co., dated 28th March, 1857.

(No. 6.) BALTIMORE, *March* 28, '57.

Messrs. J. & D. McRAE & Co.

GENTLEMEN: We telegraphed 26th to buy 100 bales cotton, best

terms, or 200 bales at 13. We have your reply, that you had bought 80 bales a 13¼, and 20 bales at 13½, which is satisfactory. We did not telegraph to buy the other lot offered, the price being too high, but after arrival of next steamer may telegraph you to buy another hundred; the price is so high that we do not fancy holding large stock.

Respectfully, yours, &c.,
S. FENBY & BRO.

Cor. 60 a 63. At 13¼ you can buy the other hundred.

(Copy No. 4.)

Letter from J. & D. McRae & Co. to S. Fenby & Bro., 28 *March*, 1857.

(No. 7.) WILMINGTON, N. C., 28 *March*, 1857.

Messrs. S. FENBY & BRO., *Baltimore.*

GENT: Nearly all the cotton in market was sold yesterday a 13¼ c., mostly a 13⅛ c. At the present time there is no good cotton in market, and orders in market unfilled. We have to-day engaged the freight of your lot per schooner Oscar R. Dawley, at $2 per bale freight. She will take it in about the middle of next week. No change in naval stores.

Respectfully, yours,
(Signed) J. & D. McRAE & CO.

(Copy No. 5.)

Letter from J. & D. McRae & Co. to S. Fenby & Brother.

(No. 8.) WILMINGTON, N. C., 1 *April*, 1857.

Messrs. S. FENBY & BRO., *Baltimore, Md.*

GENTLEMEN: We enclose invoice 100 bales cotton purchased by your order, and b. lading for 49 bales of it ship'd per schooner Oscar H. Hawley, on account of which we have to-day drawn upon you, favor Alex. MacRae, at sixty days' date, for $2,700. We had engaged freight for the 100 bales, but 51 were left out by a miscalculation. We have insured them against fire risk, and will ship by first opportunity. The "Araminta" is daily looked for, and it will go by her if no earlier vessel offers. The receipts cotton are light, and demand active at full prices. A lot of poorest quality sold yesterday at 13 c., and good parcels command 13¾ c. readily.

Yours, very respectfully,
(Signed) J. & D. McRAE & CO.

P. S. Yours of 28 ulto. was duly rec'd and noted.
(Signed) J. & D. McR. & CO.

Invoice.

Invoice 100 bales cotton, purchased by J. & D. McRae & Co., and shipped to Baltimore per schr. "O. H. Hawley" and brig "Orlando," by order and per acc't and risk of Messrs. S. Fenby & Bro., of Baltimore, Md.

1857.

Mar. 27	Bo't 55 bales cotton, (marked J. W.) 390, 408, 472, 476, 462, 454, 442, 414, 382, 368	4,268		
	404, 466, 336, 350, 336, 312, 308, 394, 446, 402	3,754		
	410, 396, 402, 408, 418, 400, 402, 450, 458, 468	4,112		
	404, 392, 376, 404, 472, 422, 374, 348, 332, 382	3,906		
	342, 472, 458, 438, 418, 334, 418, 350, 430, 370	4,030		
	442, 358, 364, 290, 458	1,912		
		21,982 a $13\frac{1}{2}$,	2,912	62
	Bo't 20 bales cotton, marked (G. W. Cooper,) 420, 426, 424, 430, 422, 412, 424, 434, 428, 434	4,254		
	408, 418, 426, 418, 438, 426, 412, 426, 424, 412	4,218		
		8,472 a $13\frac{1}{2}$,	1,143	72
	Bo't 21 bales cotton, marked 17 E. B., 3 T. E., 1 O. K. E.: 404, 414, 406, 406, 400, 410, 416, 410, 370, 396, 406	4,444		
	406, 406, 400, 404, 46, 412, 312, 364, 354, 320	3,784		
		8,228 a $13\frac{1}{16}$,	1,074	78
28	Bo't 4 bales cotton, marked J. W.: 438, 398, 310, 400—1,546 a $13\frac{1}{2}$		204	85
			$5,335	97
	Drayage 5 bales, a 7	3 50		
	Insur. on 51 bales	6 25	9	75
			$5,345	27
	$2\frac{1}{2}$ per ct. com		133	64
			$5,479	36

Bill of Exchange.

Exchange for $2,700. WILMINGTON, N, C., 1 *April*, 1857.

Sixty days after date of this, my first of exchange, second unpaid, pay to the order of Alex. MacRae, esq., twenty-seven hundred dollars, value received, and charge the same to account of

Y'r obed. serv'ts,

J. & D. McRAE & CO.

To Messrs. S. FENBY & BRO., *Baltimore, Md.*

[Written across the face:] Baltimore, April 7, '57. S. Fenby & Bro.

Endorsed: Alex. MacRae, by D. MacRae, att'y. Pay Chas. Goodwin, ass. cashier, or order. S. Jewett, cash.

Protest.

UNITED STATES OF AMERICA,
State of Maryland, to wit:

On this day, the third day of June, in the year of our Lord eighteen hundred and fifty-seven, at the request of cashier of the Merchants' Bank of Baltimore, bearer of the original bill of exchange, whereof a true copy is above written, I, Wilson M. Carey, notary public by letters patent under the great seal of the State of Maryland, commissioned and duly qualified, residing in the city of Baltimore, in the State aforesaid, presented the said bill of exchange to the acceptors thereof, and demanded payment therefor, and was answered, "It cannot be paid."

Therefore I, the said notary, at the request aforesaid, have protested, and by these presents do solemnly protest, as well against the acceptors, drawers, and endorsers of the said bill of exchange, as all others whom it may concern, for exchange, re-exchange, and all costs, charges, damages, and interests suffered and to be suffered for want of payment of the said bill of exchange.

Thus done and protested, at the city of Baltimore aforesaid; and on the same day I addressed written notices to the drawers and endorsers of said bill of exchange, informing them that it had not been paid, payment thereof having been demanded and refused, and that they would be held responsible for the payment thereof. Notices for J. & D. MacRae & Co., drawers, Alex. MacRae and S. Jewett, cash'r, endorsers, I enclosed to S. Jewett, esq., cashier of the Bank of Wilmington, Wilmington, N. C., and put the same in the Baltimore post office.

[SEAL.] In testimony whereof, I have hereunto set my hand and affixed my seal notarial, the day and year aforesaid.

WILSON M. CAREY,
Notary Public.

Protest, $2; postage, 3.

Letter from S. Fenby & Bro. to J. & D. McRae & Co.

BALTIMORE, *April* 18, 1857.

Messrs. J. & D. McRAE & Co.

GENTLEMEN: Since our last we have none of your favors. Regret we did not go ahead and buy the 200 bales. If the price is no higher, go on and buy the 200 bales on best terms, avoiding the former cotton. The market is stiffening, although the stocks are fair, but good cotton is scarce. The majority of our *stock* stocks are inferior. Not suitable for the market.

Respectfully, yours,

S. FENBY & BRO.

(Copy No. 6.)

Letter from J. & D. MacRae & Co. to S. Fenby & Bro.

WILMINGTON, N. C., *April* 4, 1857.

Messrs. S. FENBY & BRO., *Baltimore.*

GENTLEMEN: We now enclose B. L. per brig "Orlando" for 51 bales cotton, being the remainder of your lot. We got this off for 50c. pr. bale less freight than the other. Will send samples to you per express to-day.

Invoice of cotton		$5,479 36
Add 18 days' interest on $2,700	$30 60	
" 72 " " " 2,779 36	33 34	
		63 94
		$5,543 30
By draft 60 days April 1, '57		2,700
		$2,843 30

For which we have this day valued on you, in favor of Alex. MacRae, esq., at sixty days after date, which please protect.

Cotton is improving with us, and but little arriving. We quote 13 a 13¾c. No change in naval stores.

Respectfully, yours,

(Signed) J. & D. McRAE & CO.

Bill of Lading.

Shipped in good order and well-conditioned, by J. & D. MacRae & Co., on board the brig called the Orlando, whereof Kimball is master, now lying in the port of Wilmington, N. C., and bound for Baltimore, to say: fifty-one bales cotton, being marked and numbered as in the margin, and are to be delivered in like good order and well-conditioned at the aforesaid port of Baltimore, (the

G. W. Cooper,	20	dangers of the seas excepted,) unto Messrs.
J. W.,	21	S. Fenby & Bro., or to their assigns, he or
J. E.,	1	they paying freight for the said cotton
E. B.,	9	one and $\frac{50}{100}$ dollars per bale, with primage
	—	and average accustomed. In witness where-
	51 bales.	of, the master or purser of the said vessel

hath affirmed to 3 bills of lading, all of this tenor and date, one of which being accomplished the others to stand void.

Dated in Wilmington, N. C., the 4th day of April, 1857.

S. R. KIMBALL.

Letter from J. & D. McRae & Co. to S. Fenby & Bro.

(Copy No. 7.)

WILMINGTON, N. C., *April* 7, '57.

Messrs. S. FENBY & BRO., *Baltimore.*

GENTL: Your favor of the 2d at hand, contents noted. We are sorry that we did not have your order in time. All the good grades cotton have been sold, and it is arriving very sparingly with us. We could not purchase now at less than ¼ to ½ advance over our last purchase for you. No change in naval stores. Mess pork $25, sides 13½, and shoulders 12 c. Respectfully, yours,

(Signed) J. & D. McRAE & CO.

Telegraphic Despatch.

J. & D. McRae & Co. to James Corner & Sons. Rec'd Baltimore, April 24, 1857, 4 o'clock 6 min. a. m.

WILMINGTON, N. C., *April* 23, 1857.

Get from Fenby & Bro. transfer fifty-one bales cotton shipped by us per Orlando, and forty-nine for Hawley. If they refuse, stop it in transitue. One of us leaves to-day.

J. & D. McRAE & CO.

Bill of Exchange.

Exchange for $2,843 30. WILMINGTON, N. C., 4 *April*, 1857.

Sixty days after date of this first of exchange, (second unpaid,) pay to the order of Alex. MacRae, esq., twenty-eight hundred forty-three and $\frac{30}{100}$ dollars, value received, and charge the same to account of Y'r obe't serv'ts,

J. & D. McRAE & CO.

To Messrs. S. FENBY & BRO., *Baltimore, Md.*

[Written across face:] Baltimore, April 8, 1857. S. Fenby & Bro.

(Endorsed:) Alex. MacRae, by D. MacRae, att'y. Pay Chs. Goodwin, asst. cash'r., or order. S. Jewett, cash.

Protest.

UNITED STATES OF AMERICA,
State of Maryland, to wit:

On the sixth day of June, in the year of our Lord eighteen hundred and fifty-seven, at the request of cashier of the Merchants' Bank of Baltimore, bearer of the original bill of exchange, whereof a true copy is above written, I, Wilson M. Cary, notary public by letters patent under the great seal of the State of Maryland, commissioned and duly qualified, residing in the city of Baltimore, in the State aforesaid, presented the said bill of exchange to the acceptors thereof, and demanded payment therefor, and was answered, "It cannot be paid."

Therefore I, the said notary, at the request aforesaid, have protested, and by these presents do solemnly protest, as well against the acceptors, drawers, and endorsers of the said bill of exchange, as all others whom it may concern for exchange, re-exchange, and all costs, charges, damages, and interests suffered and to be suffered for want of payment of the said bill of exchange.

Thus done and protested, at the city of Baltimore aforesaid; and on the same day I addressed written notices to the drawers and endorsers of said bill of exchange, informing them that it had not been paid, payment therefor having been demanded and refused, and that they would be held responsible for the payment thereof. Notices for J. & D. MacRae & Co., drawers, Alex. MacRae and S. Jewett, cash., endorsers, I enclosed to S. Jewett, esq., cashier Bank of Wilmington, Wilmington, North Carolina, and put the same in the Baltimore post office this day.

[SEAL.] In testimony whereof, I have hereunto set my hand and affixed my notarial seal, the day and year aforesaid.

WILSON M. CARY,
Notary Public.

Protest, $2.

Notice.

To captain of brig Orlando:

SIR: We give you notice hereby to retain possession and stop in transitue fifty-one bales of cotton, shipped on board the brig Orlando by J. & D. MacRae & Co., of Wilmington, North Carolina, and of forty-nine bales of cotton shipped on board said brig by Mr. Hawley, of Wilmington, all said cotton having been consigned to Messrs. S. Fenby & Bro., of this place, they having failed in businest without having paid for the same, and we claim that possession of said cotton should be delivered to us for said J. & D. McRae & Co. and Mr. Hawley.

BROWN & BRUNE,
For J. & D. McRae & Co. and Mr. Hawley.

BALTIMORE, *April* 24, 1857.

DR. *Messrs. S. Fenby & Bro. in account current and interest each to April 1, '58, with J. & D. McRae & Co.* CR.

1857.				1857.			
April 1	To amount invoice 100 bales cotton, shipped per schr. O. H. Hawley and brig Orlando.....	.....	$5,479 36	April 1	By our dft. 60 dys. on them, favor Alex. MacRae.....		$2,700
4	68 days' interest on $2,700.....	30 60		4	" " " " "		2,843 30
	72 " " 2,779 36...	33 34		1858.			
			63 94	Apl. 1	Bal. to new acct.....		5,882 40
June 8	Amount our dr'ft a 60 d'ys, April 1, '57, on them, favor Alex. McRae, returned protested, and taken up by us.....	2,700					
	1 p. c. charg., $27; protest and postage, $2 03; 8 dy. int., 3 55.....	32 58					
			2,732 58				
11	Amount our d'ft 60 days, Ap'l 4, '57, on them, favor Alex. McRae, returned protested, and taken up by us.....	2,843 30					
	1 p. c., $28 43; protest and postage, $2 03.....	30 46					
			2,873 76				
1858.							
April 1	To 297 d'ys interest on $2,732 58 from June 8, '57, to date.....	135 23					
	294 ds. interest to June 11.....	140 83					
			276 06				
			$11,425 70				$11,425 70
1858.							
April 1	To balance per acc't due this day		$5,882 40				

E.E. WILMINGTON, N. C., *April* 1, 1858. J. & D. McRAE & CO., PER JAS. H. COLLINS.

Kyle et al. vs. MacRae et al.

13

And the following memorandum, which was admitted to have the same effect as if testified to by Mr. Gill on the stand, was also offered in evidence by the plaintiffs:

Memorandum made by Mr. Gill.

This memorandum, made 30th April, 1857, immediately after seeing George B. Kyle at his counting-room.

JOHN MCRAE, DONALD MCRAE, JOHN W. K. DIX, citizens of North Carolina, trading under the name and firm of J. & D. McRae & Co.,
vs.
GEORGE H. KYLE, SAMUEL LEE KYLE, SAMUEL A. S. KYLE, and WM. T. DALBY, under the name and firm of Dinsmore & Kyle.

On the 30th day of April, 1857, demanded from Dinsmore & Kyle fifty-one bales of cotton; received for answer that they had parted with the cotton; the freight was $1 50 per bale, making $76 50; tendered in bank notes and gold $80, which was refused; asked Geo. B. Kyle to exhibit any claims or advances if made; declined doing so, and said they had paid value for the cotton; declined upon being requested to state the nature of the transaction or anything further; said they would stand a suit; told him I was acting for J. & D. MacRae & Co., who had not been paid, and through the Messrs. Corners had stopped the cotton in transitue.

GEO. M. GILL.

Evidence of B. M. Corner.

The plaintiffs further proved, by B. M. Corner, a competent witness, that the firm of Jas. Corner & Sons, in Baltimore, of which witness is a partner, were the agents and correspondents of the plaintiffs, and received from the plaintiffs the telegraphic dispatch, marked No. 15, on the 24th April, 1857; that early on the morning of that day it was left at the dwelling of the witness, and he took it to the office of Messrs. Brown & Brune, attorneys-at-law, about eight o'clock in the morning, whom he consulted and employed on behalf of the plaintiffs, and that, by Mr. Brown's direction, the witness took the letter No. 17 to the office of Richardson, the consignee of the vessel Orlando, and that witness, Corner, and Mr. Richardson took it to the vessel, and delivered it to the captain or the officer in charge of the vessel, at about 9 o'clock in the morning of the 24 April, 1857. The Messrs. S. Fenby & Bro. had then failed. That the Orlando had arrived at Baltimore on the 23d April, 1857. That at the time when the notice was served as aforesaid, he saw some cotton already on the wharf, and some on the vessel's deck.

Evidence of Mr. Richardson.

The plaintiffs further proved, by Mr. Richardson, a competent

witness, that he was the consignee of the Orlando, and that she arrived in Baltimore on the 23d of April, 1857, having on board 51 bales of cotton consigned to S. Fenby & Brother; that he received the notification of Messrs. Brown & Brune, referred to by the witness, Corner, about 9 o'clock on the morning of the 24th, and he thinks remained in his counting-house. That by 12 o'clock of the same day all the cotton was taken away, and he presumes was delivered to Dinsmore & Kyle, the defendants.

Cross-examined.

On cross-examination, the said witness proved that he had been previously informed by Dinsmore & Kyle that they were the consignees of the bill of lading which they had shown him; that it was then simply endorsed, S. Fenby & Brother, but he asked Dinsmore & Kyle to get it endorsed as it now is. Here the bill of lading, marked No. 20, was shown to the witness, and he recognized it as the one he referred to.

Bill of Lading.

Shipped in good order and well-conditioned, by J. & D. McRae & Co., on board the brig called the Orlando, whereof Kimball is master, now lying in the port of Wilmington, N. C., and bound for Baltimore, to say: fifty-one bales cotton, being marked and numbered as in the margin, and are to be delivered in like good order and well-conditioned at the aforesaid port of Baltimore, (the dangers of the seas excepted,) unto Messrs. S. Fenby & Bro. or to their assigns, he or they paying freight for the said cotton one and $\frac{50}{100}$ dollars per bale, with primage and average accustomed. In witness whereof, the master or purser of the said vessel hath affirmed to 3 bills of lading, all of this tenor and date, one of which being accomplished the others to stand void.

G. W. Cooper,	20
J. W.,	21
J. F.,	1
E. B.,	9
	—
	51 bales.

Dated in Wilmington, N. C., the 4th day of April, 1857.

S. R. KIMBALL.

(Endorsed:) Capt'n Kimball, brig Orlando, will deliver the within to order of Messrs. Dinsmore & Kyle. S. Fenby & Bro. Dinsmore & Kyle.

That on the evening before the cotton was delivered he had seen the bill of lading endorsed, S. Fenby & Brother, but that on the 24th the bill of lading was presented to witness, at or about 12 o'clock m, endorsed as it now is, when the cotton was taken away by the defendants. He knows that it was not removed by the defendants until after the said notice from Brown & Brune was received. He did not remember whether he had given Dinsmore & Kyle notice

that the cotton would be delivered the next morning, but he presumed, from such being the custom of his house, that he had done so. He knew, however, that Kyle, at their interview the evening before, had knowledge of the fact that the cotton would be delivered next morning according to custom; that he did not suggest the alteration of the endorsement on the bill of lading as a condition of the delivery of the cotton, but that he would have delivered the cotton at any time without any alteration in the endorsement, and without the freight, they, the defendants, being a good house. There was no cotton but that in question in the Orlando's cargo.

Mr. Corner recalled.

Mr. Corner, being recalled and cross-examined by defendants, said that he had no personal knowledge of the Fenbys' failure, and knew nothing about it except from the street report.

Evidence of Mr. Lamb for Plffs.

The plaintiffs then further proved, by Mr. Lamb, a competent witness, that he was the book-keeper of the Messrs. Fenby in March and April, 1857; that they failed in business and stopped payment on the 18th of April. In making up their books and taking an account of their affairs afterwards, witness found that they had only enough to pay twenty-five per cent. of their indebtedness. Their books were made up two weeks, or perhaps three weeks, after the 18th of April. They must have been insolvent a considerable time before, certainly three months before.

The defendants then, on their part, proved by Samuel Fenby,

Evidence of Samuel Fenby for Defds.

a competent witness, that he was a member of the firm of S. Fenby & Brother, and in that capacity made the endorsement on the bill of lading, referred to by the witness, Richardson. He thought said endorsement was made before the stoppage of his house, which took place on the 18th of April, 1857; that they had, when they stopped, several bills of lading for goods which had not been paid for, which they endorsed to the parties holding the bills drawn against the same, and they would have done so with this if they had had it when they stopped; that he could not recollect the dates *but* the endorsement was made, but it was some days before the vessel arrived; that the endorsement was made in payment of two promissory notes of S. Fenby & Brother held by the defendants; that the defendants had lent to S. Fenby & Brother their two notes (here shown to the witness, marked 21 and 22) as an accommodation to the Fenbys, and which notes are as follows:

Note No. 21.

$1,453 27. BALTIMORE, *January* 29, 1857.

Four months after date we promise to pay to the order of fourteen hundred and fifty-three $\frac{27}{100}$ dollars, value received.

[Erased:] DINSMORE & KYLE.

(Endorsed:) S. Fenby & Bro.

Note No. 22.

$1,421 98. BALTIMORE, *January* 28, 1857.

Four months after date we promise to pay to the order of fourteen hundred and twenty-one $\frac{98}{100}$ dollars, value received.

[Erased:] DINSMORE & KYLE.

Due 28–31 May, 1857.

(Endorsed:) R. & H. R. Tucker.

And had at same time taken as a memorandum of the transaction the two corresponding notes following:

Note 23.

$1,421 98. BALTIMORE, *January* 28, 1857.

Four months after date we promise to pay to the order of fourteen hundred and twenty-one $\frac{98}{100}$ dollars, value received.

S. FENBY & BRO.

Due 28–31 May, 1857.

(Endorsed:) Dinsmore & Kyle.

Note 24.

$1,453 27. BALTIMORE, *January* 29, 1857.

Four months after date we promise to pay to the order of fourteen hundred and fifty-three $\frac{27}{100}$ dollars, value received.

S. FENBY & BRO.

Due 29–1 June, 1857.

(Endorsed:) Dinsmore & Kyle.

The two said notes were merely memorandum notes. It was not an exchange of notes; the transaction was one altogether for the accommodation of the Fenbys. The notes loaned by defendants were for the benefit of S. Fenby & Bro; it was a matter both of business and friendly accommodation. When witness endorsed said bill of lading, it was with the express understanding that defendants were to take up their said notes. At the time when the loan was

made, it was agreed that the Fenbys were to give property to the defendants, certain wheat which S. Fenby & Brother were to receive, as security therefor, but said wheat never was given to the defendants. That when said bill of lading was endorsed, it was expressly agreed that it was to be in payment of Fenbys' notes. Dinsmore & Kyle were to pay their own notes, which the Fenbys had got discounted, and were to retire and withdraw those of the Fenbys, which they had placed in bank for collection, but witness never knew what had become of said notes of S. Fenby & Brother. They were never returned by defendants.

Cross-examination.

The witness, on cross-examination, further said that the bill of lading was endorsed by witness at his counting-room, one of the defendants having called there; no receipt was passed for it, and no entry was made of the transfer or of the date thereof in any of the books of S. Fenby & Brother; that the amount of the invoice of the cotton was about the same as that of the notes, but there was a loss on the cotton, and it was not, therefore, enough to pay the note; that there was no understanding between him and the defendants that his house was to have the excess or make up the deficiency, as the case might be, and that he never considered them entitled to the one or responsible for the other; that there was, at the same time, in January, 1857, another loan of notes by the defendants to S. Fenby & Brother for about $2,200, and an exchange of the notes of S. Fenby & Bro. therefor, and his house afterwards gave the defendants therefor collaterals which realized more than enough to pay the claim for which they were pledges; that the defendants accounted for the excess of such last-mentioned collaterals, and deducted from it the amount the cotton had fallen short of, paying the first-mentioned notes, (Nos. 23 and 24,) and paid over the balance of $400 to the Fenbys; but that he, the witness, never recognized their right or the propriety of their doing so, considering himself discharged from the first notes by the endorsement of the bill of lading as absolute payment thereof, and only tacitly acquiescing, because he was unwilling that his accommodation creditors should lose anything by his house. The witness proved further that the defendants had rendered him an account sales of the cotton, of which the following is a copy:

Account Sales.

Sold for acct. of Messrs. S. Fenby & Bro. 41 bales cotton per brig Orlando.

Sold, Balto., May 2d, 1857:

51 bales cotton, wg. 20,769 lbs., 14¼	$1,959 58
Less disct. for cash	233 70
	$2,725 88

Less frt. paid	76 50	
Insu. in	46 13	
Insur. in Balto., $4 70; storage, $6 38	11 08	
Drayage, 4 25; labor, 2	6 25	
Wharfage, $3 57; brokg., $19 80	23 37	
		163 33
Net proceeds cr. to		$2,562 55

the payment of our two notes, as per agreement.

DINSMORE & KYLE.

No commission charged.

And had appropriated the proceeds in conformity with said account. The said $400 were paid by defendants to said witness a considerable time after said account was rendered.

The witness further proved, on cross-examination, that the invariable custom in the south is to sell cotton for cash. The custom here is generally to sell on credit.

The defendants had in court Geo. H. Holland, the discount clerk of the Citizens' Bank, by whom they were prepared to prove that the notes of S. Fenby & Bro., (Nos. 23 and 24,) referred to by the witness, R. D. Fenby, had been placed in said bank by defendants for collection, and were withdrawn some considerable time before their maturity; but said facts were admitted by plaintiffs' counsel, and the testimony of the witness dispensed with.

Evidence of James Carey Coale for Defds.

The defendants further proved, by James Carey Coale, that he was the agent of the Atlantic Insurance Company throughout the year eighteen hundred and fifty-seven, in which company S. Fenby & Bro. had an open policy, on which the risk of the cotton in question was noted; that Fenby told the witness, before the arrival of the vessel, (and witness thinks it was the day when they stopped payment, or the day before, but certainly not later than the day of their stoppage,) that he had transferred the bill of lading of the cotton referred to by the other witnesses to the defendants, and had no longer any insurable interest in it, to which witness replied, that he would cancel the policy unless the defendants would agree to be responsible for the premium; that Fenby told him to see them, that it was understood they were to pay it. Witness is almost certain that defendants assumed to pay for the insurance on the day on which the Fenbys failed; that he accordingly saw the defendants on the said day of the failure, and they became responsible therefor, and subsequently paid it, for which witness produces the following receipt:

Receipt.

BALTIMORE, *Ap'l* 14, 1857.

Messrs. S. Fenby & Bro., for ac. of J. & D. McRae & Co., to Atlantic Insurance Co., Dr.

For prm. on insuc. on 51 b. cotton per brig, $30 75, a 1½ p. c..... $46 13

Rec'd payment of D. & Kyle.

JAS. CAREY COALE, *for the Co.*

Correct: S. FENBY & BRO.

That the date of the receipt only indicates the inception of the risk, and not the time when the money was paid or the bill for the first time shown to the defendants, which was some weeks after.

The witness, being recalled by the defendants, stated that the names of McRae & Company got into the receipt entirely by the mistake of the witness. The Fenbys had a book containing an open policy, in which were noted from time to time different insurances effected by them. That they shipped largely to England and elsewhere, and were in the habit of transferring bills of lading; and the insurance company, when notified of such transfers, were in the habit of inserting in the said book, as to the insurance on the goods so transferred, for account of the assignees; and that witness meant in this bill, in accordance with such custom, to have inserted the names of Dinsmore & Kyle in said bill, but by mistake inserted that of McRae & Company, and that the names of the latter nowhere appeared in said policy, and they had nothing to do with said insurance, but that witness had been a clerk of the Fenbys, and knew the course of their business, and that the cotton came from McRae, and must then have had them in his mind, which caused the error.

On cross-examination, the witness stated that, at the time when the defendants agreed to pay the insurance, said bill was shown to him, and was marked correct by S. Fenby & Brother.

The plaintiffs then recalled their witness, Lamb, and asked him if the witness, Fenby, had not told him that the bills of lading for said cotton *was* transferred as collateral security for the two notes of the said Fenby hereinbefore referred to, and the said witness replied that said Fenby had told him the bill of lading was transferred to pay said notes; that his (the witness') understanding then was and had since continued that the proceeds of the cotton were to pay the notes.

Evidence of H. A. Thompson for Defts.

The defendants then proved, by Henry A. Thompson, a competent witness, that he had for a number of years been the owner of ships trading to this port, and had recently been, and continued to

be, a shipping merchant, in both which capacities he was familiar with the custom and usage of the port of Baltimore, in regard to the discharging and loading goods from vessels in the coasting trade; that the invariable custom and usage was, after giving notice to the owner of the goods on board, to land the goods on the wharf, and from the moment of their being so landed after such reasonable notice, or reasonable previous knowledge on the part of the consignees, they were at the risk of the owner, and the vessel discharged from liability in regard thereto.

Cross-examination.

The witness, on cross-examination, said that it was the duty of the mate or some other officer of the vessel, after they were put on the wharf, to see that they were not delivered to or taken away by a person not entitled to them, and that the mate and he supposed the vessel could be responsible if he improperly delivered them or permitted them to be taken away, but that the only further responsibility of the vessel and officers in reference to them was to see that they should not be taken away by persons not entitled to them. If the owner came in person, or a drayman known to be his, either took them away without questioning. But as to fire or water or destruction, otherwise good when once landed on the wharf, after reasonable notice or knowledge, were at the consignee's risk. Witness does not know of any case in which the question has arisen, but it is his opinion that this is the custom.

Evidence of D. J. Foley for the Defts.

The defendants further proved, by D. J. Foley, that he is a shipping merchant, and familiar with the custom and usage of the port of Baltimore, in respect to the delivery of goods from vessels; that such invariable custom and usage is, after reasonable notice to the owner of goods, to put them on the wharf at the risk of the owner, and the responsibility of the vessel as a carrier is, from the moment they are so discharged, at an end; that the vessel may, if she has finished unloading, haul off from the wharf, and leave them there at the owners' risk, without even any custodiary care of them. The witness further said, that what would be reasonable notice depended very much upon the nature of the articles to be delivered, and must be such as would enable the owner to come for and take away his goods, not at his convenience merely, but by the exercise of ordinary and proper diligence. That in regard to small packages or boxes, such as cigars, which were liable to be stolen or carried off, the notice of the time when they were to be landed, or were landed, on the wharf, was required to be more precise than in regard to more bulky and weighty ones, such as hogsheads of sugar or bales of cotton. That under the established usage and custom of the port of Baltimore, if the owners of bales of cotton

were notified, or otherwise had knowledge, in the afternoon, that they were to be delivered next day, the vessel was entitled to land them on the wharf next day after proper business hours commenced, and thereby discharge herself from further responsibility in regard to them. That business hours began for that purpose at eight or half-past eight o'clock in the morning. The owner of the bales of cotton might send for them at any time during the day, at his convenience, but while on the wharf they were at his risk after a reasonable time had elapsed, and by nine o'clock such a reasonable time would elapse, in regard to large articles like cotton, in witness' opinion of the custom.

Cross-examination.

On cross-examination, he states that it was the duty of the mate or other officer of the vessel in charge to deliver goods to the owner or his proper agent when called for after they are landed on the wharf.

Evidence of Charles Taylor for Defendts.

The defendants proved, by Charles Taylor, that he is a merchant of Baltimore engaged in shipping goods and receiving shipments thereof, and that he is acquainted with the usages of the port of Baltimore in regard to shipments, and, as he understands the custom, where a party is notified that goods consigned to him are to be delivered, they are at his risk when they are landed on the wharf.

Cross-examination.

On cross-examination, he proved that the consignee applied to the officers of the vessel whose business it may be to deliver the goods; that an order is sent to show that the drayman or other person sent is entitled to receive them; that a consignee should have reasonable notice of discharge of cargo; and that witness should consider 9 o'clock a. m. on the day after notice of a vessel's readiness to discharge cargo as too soon to constitute a reasonable time, and place the cargo at the consignee's risk.

Evidence of Mr. Hall for Defendts.

The defendants proved, by Mr. Hall, that he is the agent for two lines of steamers—the Boston and Savannah lines—which run out of Baltimore: that by the usage and custom of the port of Baltimore, with which he is familiar, if, on the evening before, a consignee has notice that a vessel will be discharged the following day, the goods, when landed on that day on a wharf in Baltimore, are at the risk of the consignee.

Cross-examination.

On cross-examination, he proved that the bills of lading of his

lines, and the printed notices which they send to consignees, give notice that, unless the goods are called for in twenty-four hours, they will be stored by the company at the expense of the consignee. That they have a delivery clerk to attend to the delivery of goods by their lines; that when parties come for goods, and are not known, they are required to produce the bill of lading, and that the vessel would be liable if the goods were delivered to the wrong party, but if known to be the consignees, or the drayman or other agent of the consignees, they are delivered without production of the bill of lading.

And the plaintiffs offered proof, by Mr. Corner and Mr. Richardson, that by the custom of the port of Baltimore, as they understood it, a consignee would have the whole day after notice or knowledge given, or had to take away his goods, and that they would not be at his risk on the wharf during that time. That they had long been merchants, and acquainted with the usage of the port of Baltimore, and that they never heard of any custom by which landing goods on a wharf at 9 o'clock a. m. of the day when a vessel commenced discharging could be considered as a delivery to the consignee; that such a custom would be absurd; that consignees could not be in readiness at such a time to receive all their goods which might come by a vessel; that if there were any such custom they would have heard of it.

And said Corner, on being cross-examined, stated that if, at 9 o'clock a. m., his goods were landed, and he chose to call for them or send for them, the liability of the vessel would be at an end; but if he chose to put off calling till 12 o'clock or 5 o'clock p. m., he could, in his discretion, continue the liability of the vessel down to those hours, and that the liability of the vessel could thus be protracted during that day at the will of the consignee, and that he saw no absurdity in that.

The defendants then offered in evidence, subject to exceptions, the following provision of the regulations of the board of trade of Baltimore city:

Regulation of the Board of Trade.

All goods brought to this port on freight must be delivered on a wharf at the expense of the vessel bringing the same; a delivery, after due notice, on any good wharf at Fell's Point, during business hours, is a delivery in the city and port of Baltimore. Hides and articles prohibited to be landed in the city at certain periods may be landed where the public authorities may direct.

In all cases when vessels are obliged (by the quarantine regulations or city authorities) to discharge their cargo in the stream, the expense of delivering the same east of Jones' Falls will be borne by the carrier only; but when requested by the consignee to be delivered west of Jones' Falls, the expense shall be equally borne by the carrier and consignee, (each one-half.)

And it is admitted that all that part of the city bordering on the harbor which is east of Jones' Falls, and farther removed from the centre of the city, and farthest down the river of all that part of the city where goods are landed, is called Fell's Point.

And proved, by George U. Porter, a competent witness, that he was the secretary of said board, and had been for some years; that the regulations of said board now existing were established by the chamber of commerce in 1825, revised by the board before its incorporation, in 1837, and again in 1857, but that this particular provision had never been altered, but had been in force from 1825 to the present time.

That the witnesses, Corner and Richardson, and the defendants were all members of the said board of trade in April, 1857, at the time of the transactions in controversy.

The defendants further proved the act of incorporation of said board of trade (which it is agreed may be read from the printed statute book of the State of Maryland in the Supreme Court.)

Evidence of Edw'd B. Dallam.

And also proved, by Edward B. Dallam, treasurer thereof, that he had been an officer of said board for several years, and that the provision of said regulation aforementioned was referred, with the other regulations, to a committee, who reported the same back to the board for its approbation, and the same were approved and adopted by the members of the board at a meeting held for that purpose.

And the testimony aforesaid having been given, the plaintiffs offered the following prayers:

Plaintiffs' Prayers.

1. That if the jury find that the fifty-one bales of cotton mentioned in the evidence, and claimed by the plaintiffs, were sold by plaintiffs, then residing and conducting business in Wilmington, North Carolina, to Messrs. S. Fenby & Brother, then residing and carrying on business in Baltimore, Maryland, upon a credit of 60 days, at the time and in the manner given in evidence by the plaintiffs; and that the plaintiffs have received no part of the purchase-money of the said fifty-one bales of cotton; and that, in pursuance of such purchase, the said fifty-one bales of cotton were shipped on board the brig Orlando, consigned to Messrs. Fenby & Brother, as given in evidence by the plaintiffs; and that, before the said vessel arrived in Baltimore, the Messrs. Fenby & Brother stopped payment, and were in fact insolvent; and that at the said sale of the said 51 bales of cotton, and before the delivery of the said fifty-one bales of cotton, or any part thereof, the plaintiffs ascertained the insolvency of the said Fenby & Brother, and stopped the delivery

of the said fifty-one bales of cotton, by giving the notice given in evidence to the consignee of the said vessel, and to the captain or mate then in charge of said vessel; and further find that, after the stoppage in transitu, the said defendants took possession of the said cotton, and converted it to their use; and further find that, before the institution of this suit, the plaintiffs, by their agent, George M. Gill, demanded the said cotton of the *of the* defendants, and tendered the freight thereon, but that the defendants refused to deliver said cotton and to accept said freight, and also refused to exhibit to said agent of the plaintiffs any claims or advances which they, the said defendants, had made on said cotton, although requested so to do, if the jury find such request, then the plaintiffs are entitled to recover the value of the cotton.

2. If the jury find the facts stated in the plaintiffs' first prayer, and further find that there had been an exchange of notes in the month of January, 1857, between the defendants and the firm of S. Fenby & Bro., for the benefit and accommodation of the said firm of S. Fenby & Bro.; and further find, some time in the month of April, 1857, and at a time when the said firm of S. Fenby & Bro. was in fact insolvent—if the jury find the said firm to have been insolvent at such time—they assigned the bill of lading of the said 51 bales of cotton to the defendants as collateral security, for the purpose of enabling the defendants to sell the said bales of cotton, and to apply the proceeds thereof, so far as they may go, in payment of two of the said notes of S. Fenby & Bro., which they had given in exchange for the said two notes of defendants, given in evidence, and not in discharge of the same; and that there was no new or superadded or additional consideration between the said S. Fenby & Bro. and the defendants, then the plaintiffs are entitled to recover the fair value of the said bales of cotton.

3. If the jury find the facts stated in the plaintiffs' first and second prayers, and further find that, at the time the said firm of S. Fenby & Bro. transferred to the defendants the bill of lading of the said 51 bales of cotton, they were insolvent, and that they had paid no part of the amount due for the said 51 bales of cotton, and had at the time of such transfer no reasonable expectation of being able to pay for the said 51 bales of cotton; and that the defendants knew or had reason to believe that the said firm of S. Fenby & Bro. had not paid for the said 51 bales of cotton, and had, at the time of such transfer, no reasonable expectation of being enabled to pay for the same, then the plaintiffs are entitled to recover.

And the defendants, the prayers following—

Defendants' Prayers.

1. If the jury believe from the evidence that S. Fenby & Brother were insolvent, before and at the time when the cotton in question was shipped and the bill of lading forwarded to said Fenbys, then

the plaintiffs had no right of stoppage in transitu, and are not entitled to recover in this action.

2. If the jury believe from the evidence that the bill of lading, produced in proof by the defendants, was endorsed to them by S. Fenby & Bro. prior to the serving of the notice of Messrs. Brown & Brune, produced by the plaintiffs, upon the consignee and master of the Orlando, (if the jury find such notice so served,) for the purpose of paying or securing an antecedent debt or responsibility of the said defendants, for or on account of and for the accommodation of S. Fenby & Brother, and the defendants received and accepted it, in good faith, for such purpose, without any notice of any equities or rights of the plaintiffs, and bona fide, and without any such notice, and on the faith of such transfer and endorsement of said bill of lading to them, assumed the payment of the premium of insurance upon the cotton described in said bill of lading to the underwriters, before the receiving of the said notice of Brown & Brune, and afterwards, in pursuance of said assumption, paid the same, then the plaintiffs could not lawfully demand possession of said cotton, without tendering the amount of said premium to the defendants, and having no evidence of any such tender, are not entitled to recover.

3. If the jury shall believe from the evidence that Messrs. S. Fenby & Bro. had, prior to the serving of the notice of Messrs. Brown & Brune on the consignee and master of the Orlando, as given in evidence by the plaintiffs, (if the jury find the same,) transferred the bill of lading in question, by endorsement, to the defendants, either as absolute payment or as collateral security for the payment of the two promissory notes of S. Fenby & Bro., produced by the defendants; and that those promissory notes were then bona fide and actually payable by said S. Fenby & Bro. to the defendants, though not fully matured and due, and that the defendants received the same bona fide as such payment or security, and without notice of any rights or equities of the plaintiffs in respect to said bill of lading or the cotton therein mentioned, then the plaintiffs are not entitled to recover—if the jury find that the said cotton was not worth, when it reached the hands of the defendants, as much or more than the amount of the said two said promissory notes.

4. If the jury believe from the evidence in the cause that, before the purchase of the cotton for which the defendants are sought to be held responsible in this cause, the defendants had lent to S. Fenby & Bro. the two promissory notes of the defendants, or taken in exchange two promissory notes of the said S. Fenby & Brother, solely for the accommodation of the said S. Fenby & Brother, and that the said S. Fenby & Brother discounted said notes for their own accommodation, with the understanding and agreement that the latter were to give to the defendants security therefor; and shall further believe from the evidence that, before the maturity of

either of said notes, and before the arrival of said cotton in Baltimore, the S. Fenby & Brother assigned the same, by endorsement of the bill of lading, to the defendants, with the understanding and agreement that the defendants would pay their own notes, and retire and withdraw those of the said S. Fenby & Brother, and that the defendants in good faith accepted said assignment for that purpose, and did accordingly pay their own notes, and retire and withdraw those of S. Fenby & Brother, and did afterwards become responsible for and pay the insurance on said cotton, the plaintiffs are not entitled to recover.

5. If the jury believe that the fifty-one bales of cotton, for which recovery is sought in this case, were but part of a lot of one hundred bales bought by the plaintiffs for S. Fenby & Brother, under and by virtue of the same order, and that the balance of said cotton had been delivered to S. Fenby & Brother or their agent or assigns before the notice by Messrs. Brown & Brune was served on the master, if they believe that it ever was so served, that the delivery of the said forty-nine bales put an end to the right of stoppage in transitu as to the balance, *and* the plaintiffs are not entitled to recover—provided the jury find the facts set forth in the 2d and 3d prayers of defendants.

6. That the plaintiffs are not entitled to recover, unless the jury find from the evidence that the notice of Messrs. Brown & Brune, offered by the plaintiffs, was served upon the master of the Orlando before delivery of the cotton in question to the defendants.

7. That the plaintiffs are not entitled to recover, if the jury believe from the evidence that, before the notice was given to the master or officer in charge of the Orlando, (if they find such notice,) the cotton in controversy was on the wharf, and the defendants had reasonable previous notice or knowledge that said cotton was intended to be so discharged; and shall further believe that, by the custom in the port of Baltimore, cargo so discharged, after such notice or knowledge, is at the risk of the owner, as between him and the carrier, and is, as between them, a delivery.

8. That the plaintiffs are not entitled to recover, if the jury believe from the evidence that, before the arrival of the Orlando, S. Fenby & Brother had assigned and delivered the bill of lading in controversy to the defendants, in payment of two promissory notes of the said S. Fenby & Brother held by defendants, and the defendants bona fide, and without notice of any claim of plaintiffs, had accepted the same as such payment, and on the faith of said assignment and delivery, and equally in good faith, and without such notice, before the arrival of the Orlando, had become responsible for and did afterwards pay the premium of insurance on said cotton to the underwriters, under a policy of said Fenby & Bro. covering said cotton for the voyage then depending.

9. If the jury find the facts stated in the 2d and 3d prayers of the plaintiffs, and further find that the notice by Messrs. Brown &

Brune, offered in evidence by the plaintiffs, was served upon the master or officer in charge of the Orlando, on the morning of April 24, 1857, and that previously thereto the defendants had received reasonable notice of the intention of the said master to discharge the brig on the said 24 of April, and that in conformity with said notice a portion of the cotton in question had been actually discharged, and was lying on the wharf ready for removal by the defendants, when the said notice of Messrs. Brown & Brune was served as aforesaid, then said discharge was a delivery to the defendants of the cotton so discharged, and plaintiffs cannot in any event recover in this case more than the value of the cotton remaining on board; and if the jury find that there is nothing in the evidence from which they can ascertain the quantity and value of the said cotton so remaining on board, but that all the evidence in regard thereto is wholly indefinite, then they cannot find a verdict for the plaintiffs in any event for more than nominal damages.

10. That a delivery on the wharf after reasonable notice to a consignee or holder of a bill of lading, or a reasonable previous knowledge on his part of such intended delivery, is a delivery which puts an end to the right of stoppage in transitu; and if the jury find that the cotton in question was, after such reasonable previous knowledge or notice to or on the part of the defendants, actually discharged on the wharf, in whole or in part, when the notice of Messrs. Brown & Brune, produced by the plaintiffs, was served on the master of the Orlando, then the plaintiffs are not entitled to recover, provided the jury shall believe that the said bill of lading had been endorsed by S. Fenby & Brother to the defendants before such previous notice or knowledge of intended discharge, for a valuable consideration pre-existing or created at the time of such endorsement, and that said defendants received and accepted the same upon such condition, in good faith, and without any notice of any equities or claims of the plaintiffs.

11. If the jury believe the facts assumed in the 2d and 3d prayers of the defendants, and that at the time of the demand made by Mr. Gill on the defendants, as given in evidence by plaintiffs, the defendants had already disposed of the cotton in controversy, there is no proof of conversion in this case, and plaintiffs cannot recover.

And thereupon the witness, Corner, at his request, and by the court's permission, was recalled, and stated that, at the time when he went to the Orlando, and the notice of Messrs. Brown & Brune was served on the officer in charge, there were from 8 to 12 bales of cotton or thereabouts on the wharf, and there were other bales on the vessel's deck; whereupon the court rejected the several prayers of the plaintiffs and defendants, and gave to the jury the following instructions:

Court's Instructions.

1. If the jury find from the evidence in this case that the plain-

tiffs sold the 51 bales of cotton on a credit of sixty days to the Messrs. Fenbys, merchants of this city, and that the same were shipped on board the brig Orlando to be transported to this city, and the bill of lading for the same sent by the plaintiffs to the Messrs. Fenbys, and shall further find that, before the arrival of the said cotton at this port, the Messrs. Fenbys failed in business, and stopped payment, without having paid for said cotton, and the plaintiffs, on hearing of said failure, and before the delivery of the said cotton to the Messrs. Fenbys or their assignees, gave the notice to those in charge of the said vessel not to deliver said cotton, in the manner stated by Mr. Corner, then the plaintiffs are entitled to recover in this action; although the jury may further find, that before the arrival of the said cotton, and before the failure of the Messrs. Fenbys, they had endorsed the bill of lading, and handed the same over to the defendants, either in payment of the two promissory notes of the Messrs. Fenbys, dated in January, 1857, and due in June, 1857, or as collateral security for the same.

2. If the jury shall find from the evidence in this case that, before the receipt of the notice from Mr. Corner, part of the cotton had been landed on the wharf, for the purpose of delivery to the assignees of the Messrs. Fenby, and shall further find that it is the established course and usage of the coasting trade at this port [to] deliver goods on freight upon the wharf, and that in this case the defendants had been notified, on the evening of the 23d of April, by the agent of the vessel, that such delivery would be made on the morning of the 24th, or had knowledge otherwise that such delivery would be made, then such delivery on the wharf discharged the ship and master from their liabilities as common carriers in respect to the cotton so delivered, and plaintiffs can only recover for such amount of said cotton as they may show to the jury by the evidence was not then landed on the said wharf; and if the jury shall not be able to find from the evidence what certain amount had then been landed, and what remained on said vessel, they can only recover nominal damages; although the jury may further find that, by the general and established custom of this port, the carriers are to be considered as in the custody and care of the said goods after they are landed on the wharf as aforesaid, until a reasonable time has elapsed to enable the consignee to remove the same.

To which refusal to grant, and the rejection of their prayers, and the giving of instructions aforesaid by the court, and to the instructions themselves, the defendants asked leave to except, which was granted, and prayed the court to sign and seal this their bill of exceptions, which is accordingly done this thirteenth day of November, A. D. 1858. WILLIAM F. GILES. [SEAL.]

Plaintiffs' 1*st Exception.*

And the plaintiffs, at the time when the provision of the board of trade was offered in evidence in the cause, objected thereto, as

not being applicable, and not showing or tending to prove a custom as to what constituted a delivery of goods landed from a vessel on a wharf in the port of Baltimore; but the court overruled the objection, and permitted the evidence to go to the jury, to which the plaintiffs asked leave to except, and prayed the court to sign and seal this their first bill of exceptions, which is accordingly done this thirteenth day of November, A. D. 1858.

WILLIAM F. GILES. [SEAL.]

Plaintiffs' 2d Exception.

The testimony having been given as stated in the foregoing exceptions, and which testimony is hereby made a part of this, as if again inserted, the plaintiffs excepted to the rejection of their said prayers, and to each of them, and to the second instruction given by the court, and prayed the court to sign and seal this their second bill of exceptions, which is accordingly done this thirteenth day of November, A. D. 1858. WILLIAM F. GILES.

And now here, at this day, to wit, the thirteenth day of November, in the year of our Lord one thousand eight hundred and fifty-eight, the said George H. Kyle, Samuel Lee Kyle, and Samuel A. S. Kyle produced to the circuit court here the writ of the United States of America for the correcting of errors of and upon the premises, commanding the record and proceedings aforesaid of the judgment aforesaid, so as aforesaid rendered, with all things concerning the same, to be transmitted to the Supreme Court of the United States, to be held at the city of Washington on the first Monday in December next, which said writ of error is in the words and of the tenor following, to wit:

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the fourth circuit in and for the Maryland district, greeting:

[SEAL.] Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court, before you or some of you, between John MacRae, Donald MacRae, and John W. K. Dix, plaintiffs, and George H. Kyle, Samuel Lee Kyle, and Samuel A. S. Kyle, defendants, a manifest error hath happened, to the great damage of the said George H. Kyle, Samuel Lee Kyle, and Samuel A. S. Kyle, as by their complaint appears: we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on

the first Monday in December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable R. B. Taney, Chief Justice of our Supreme Court, the first Monday in December, in the year of our Lord one thousand eight hundred and fifty-seven.

Issued 13th November, 1858. THO. SPICER,
Clerk Circ't C't.

THE UNITED STATES OF AMERICA,

To John MacRae, Donald MacRae, and John W. K. Dix, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at the city of Washington on the first Monday in December, A. D. 1858, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fourth circuit in and for the Maryland district, wherein George H. Kyle, Samuel Lee Kyle, and Samuel A. S. Kyle are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said George H. Kyle, Samuel Lee Kyle, and Samuel A. S. Kyle, in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in this behalf.

Witness my hand and seal, this 24th day of November, in the year of our Lord one thousand eight hundred and fifty-eight.

WILLIAM F. GILES. [SEAL.]

We acknowledge notice of the above citation.

BROWN & BRUNE,
For Defendants in Error.

In pursuance whereof, and according to the form and effect of the act of Congress in such case made and provided, a transcript of the record and proceedings of the judgment aforesaid, so as aforesaid rendered, with all things relating to the same, together with the said writ of error, are hereby transmitted to the said Supreme Court accordingly.

Writ of Error Bond.

Know all men by these presents, that we, George H. Kyle, Samuel Lee Kyle, Samuel A. S. Kyle, and Adam B. Kyle, of the city of Baltimore, in the State of Maryland, are held and firmly bound unto John McRae, Donald McRae, and John W. K. Dix, in the just and full sum of forty-three hundred dollars lawful money of the United States, to be paid to the said John McRae, Donald McRae, and John W. K. Dix, their heirs, executors, administrators, or assigns, to which payment, well and truly to be made and done, we hereby bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our